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Nos. 82-1005, 82-1247, 82-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A., INC.,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents;

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents;

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*

DAVID D. DONIGER

Attorney for Respondents
1725 I Street, N.W., Suite 600
Washington, DC 20006
(202) 223-8210

October 28, 1983

QUESTION PRESENTED

Whether the Clean Air Act permits the Environmental Protection Agency to redefine the term "stationary source" to mean whole industrial plants only, and thereby to exempt major new units built within plants (such as boilers and blast furnaces) from pollution control requirements established by the Act.

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ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
AMERICAN LUNG ASSOCIATION OF NORTHWESTERN OHIO, INC.,
Respondents.

INTRODUCTION

Millions of Americans live in areas of the country where minimum federal standards for healthful air quality are still violated. Because public health is at stake, the Clean Air Act, 42 U.S.C. §§7401 *et seq.*,[1] imposes its most demanding requirements on pollution sources located in these areas.

Special requirements for new industrial sources, over and above those applicable to existing sources, have always been central to the Act's program for meeting the public health standards. Since 1970, the Act has required new or modified

[1] All citations to current provisions of the Clean Air Act are to Supp. V of the U.S. Code. References to provisions of the 1970 Act which were subsequently amended are given to Pub. L. No. 91-604, 84 Stat. 1676 (1970), by their Statutes at Large citation.

"stationary sources" to undergo a special locational review prior to construction in areas with unhealthy air.[2] The Act defined "stationary source" to include any discrete unit of production, regardless whether located on its own or within a larger industrial plant: "any building, structure, facility or installation" which emits pollution.[3] In 1977, Congress amended the preconstruction review program to impose additional specific pollution control requirements on new or modified "*major* stationary sources" (defined as sources emitting more than 100 tons of pollution per year) locating in such areas. These requirements are implemented through a permit process known as new source review.[4]

The issue presented by this case is whether Congress granted the Environmental Protection Agency (EPA) authority to change the long-established definition of "stationary source," and thereby to greatly narrow the scope of the Clean Air Act's new source review requirements.

The issue may be crystallized as follows. All of the parties agree that if a company wishes to build a new industrial structure or unit which will emit more than 100 tons of pollution per year (*e.g.*, a large boiler, a blast furnace, or the like) at a *new site* in an area violating the health standards, this project is a "major stationary source." All parties agree that as such, the project is subject to five statutory requirements:

First, the state must have a *complete air pollution control program*; it must have adopted, and EPA must have approved, a State Implementation Plan (SIP) meeting all requirements of the Act.[5] States lacking complete control programs may not allow major new sources to be constructed in areas violating the health standards. Section 110(a)(2)(I), 42 U.S.C.

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[2] Sections 110(a)(2)(D) & (a)(4), 84 Stat. 1680, 1681, 1683.

[3] Section 111(a)(3), 42 U.S.C. 7411(a)(3).

[4] Sections 110(a)(2)(D) & (I), 172(b)(6) & (11), 173, 302(j), 42 U.S.C. §§7410(a)(2)(D) & (I), 7502(b)(6) & (11), 7503, 7602(j).

[5] See Sections 110, 172, & 173, 42 U.S.C. §§7410, 7502, & 7503.

§7410(a)(2)(I).[6] This condition spurs industry and state cooperation to adopt complete SIPs.

Second, the company must *offset* the new source's pollution by reducing pollution from an existing source by a greater amount. Section 173(1)(A), 42 U.S.C. §7503(1)(A).[7] The offset assures that all major new sources reduce pollution rather than increase it.

Third, the company must assure that the new source complies with the "*lowest achievable emission rate*," a state-of-the-art pollution control requirement intended to maximize the number of new sources that may be built consistent with protecting public health. Section 173(2), 42 U.S.C. §7503(2).[8]

Fourth, the company must demonstrate *company-wide compliance*: that all commonly-owned existing sources in the the same state are complying with the emission limits applicable to them. Section 173(3), 42 U.S.C. §7503(3). This requirement gives firms a clear incentive to comply with the law at their existing sources.

Fifth, in areas granted an additional five year extension to meet the standards,[9] the company must demonstrate (after considering alternative sites, sizes, production processes, and emission controls) that *the benefits of the source exceed its environmental and social costs*. Section 172(b)(11), 42 U.S.C.

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[6] Under this provision, if a complete SIP was not in place by mid-1979, then a temporary moratorium on constructing or modifying "major stationary sources" was to come into effect. It ends when the deficiencies are cured. The construction moratorium also comes into effect if a state does not carry out its plan. Section 173(4), 42 U.S.C. §7503(4).

[7] The offset requirement applies unless the SIP contains a "growth allowance" sufficient to accomodate new sources and still meet the health standards. Sections 172(b)(5), 173(1)(B), 42 U.S.C. §§7502(b)(5), 7503(1)(B).

[8] The "lowest achievable emission rate" is defined as the most stringent emission limitation for a like source which is required by any state or achieved in practice. Section 171(3), 42 U.S.C. §7501(3).

[9] The health standards for three of the pollutants must be attained by December 31, 1982. If additional requirements (including the above-described cost-benefit test) are put in place, areas may have until December 31, 1987, to meet two other standards. Section 172(a), 42 U.S.C. §7502(a).

§7502(b)(11). This most intense scrutiny of new sources is in exchange for the extra time for attainment.

As stated above, all parties agree that all five conditions must be met before the new unit emitting 100 tons of pollution per year may be constructed at a new site. Our disagreement is whether the Clean Air Act treats this project any differently if it happens to be built not at a new site, but within a *pre-existing plant*.

Respondents contend that exactly the same rules apply to the 100-ton-per-year unit built within a plant. For 10 years, until the October 1981 rules change here under review, the regulations of the Environmental Protection Agency agreed.[10]

Now, however, EPA and the industrial petitioners contend that completely different rules apply to such a unit. The petitioners assert that upon *partial* fulfillment of only *one* of the five conditions on construction of a "major stationary source," the unit built within a plant is no longer a "major stationary source" at all. It may then be built without any regard for the four other conditions.

Under the new EPA rules, the unit built within an existing plant completely avoids being a "major stationary source" merely by securing a partial emissions offset from other sources in the plant. The intra-plant reduction does not even have to equal the pollution increase from the new unit. Where the statutory offset condition requires a net decrease in pollution, the new EPA rules allow total pollution to increase. Net increases of 25 to 100 tons per year are treated as though they simply did not occur.[11]

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[10] See pages 15-19, *infra*.

[11] 40 C.F.R. Part 51, App. S, II(A)(13), 40 C.F.R. §§51.18(j)(1)(xiii), 52.24(f)(13). These plant-wide emission increases may be *repeated* every five years or less. See 40 C.F.R. Part 51, App. S, II(A)(7)(ii), 40 C.F.R. §§51.18(j)(1)(vii)(*c*)(*1*), 52.24(f)(7)(ii).

The petitioners frequently claim that the substance of the first condition (a complete SIP) is also being observed. They claim that EPA allows use of the plant-wide "source" definition only when a SIP is in place which assures timely attainment of the standards and reasonable further progress

(footnote continues)

The exemption of units built within plants is not an academic issue, for in areas with unhealthy air more than *90 percent* of the new projects that themselves emit 100 tons or more per year are built within existing plants.[12] Nearly all such projects can obtain an intra-plant emission reduction sufficient to keep the plant's net emissions from growing by more than 25-100 tons per year.[13] Previously these projects were covered by all five statutory conditions on construction or modification of "major stationary sources." Now they are all exempt.[14]

(footnote continued)

in the interim. This is not so, however. The EPA rules allow use of the plant-wide definition even in areas which have failed to adopt *any* SIP. Such areas are supposed to be subject to a moratorium on construction of "major stationary sources." Section 110(a)(2)(I), 42 U.S.C. §7410(a)(2)(I). But since a unit within a plant is no longer considered a "major stationary source" so long as it has a partial offset, the moratorium is evaded.

[12] For example, in the San Francisco Bay Area, there were 46 major additions or modifications to major existing plants built between December 1977 and January 1982; only one new major source was constructed in this period at a virgin site. Declaration of Jeff Gabe, Research Director, Citizens for a Better Environment (San Francisco), ¶11 (Jan. 1982) (J.A. 170). Nationwide, EPA recorded more than 590 major additions to or modifications at existing plants in nonattainment areas between 1976 and 1980, and no more than 14 instances in which a major new project was built in such areas at a wholly new site. EPA, "Emissions Offsets, Banking, and Trading Update (Feb. 1980)", cited in Gabe Declaration.

[13] In the cases tallied in the prior note, 590 out of 604 major stationary sources obtained their *greater-than-even* offsets from other sources within the same plants. *A priori*, under the present rules they could have obtained *partial* offsets and evaded being "major stationary sources" to begin with.

[14] The plant-wide "source" definition is a serious abuse of the "bubble concept," a regulatory approach under which groups of independent sources are treated as part of a single, larger whole and allowed to trade emission limits among themselves. While the bubble concept does have valid applications under the Clean Air Act, it may *not* be used to let sources escape specific statutory requirements. Yet that is exactly what the plant-wide "source" definition does.

All three *amici curiae* for the petitioners discuss wholly different applications of the bubble concept. Without implying a judgment on the specific bubbles discussed in their briefs, respondents note that the legality of each other type of the bubble will have to be evaluated on its own merits. Those, however, are cases for another day.

What statutory support do the petitioners offer for treating new major-emitting units built within plants differently from new major-emitting units built on their own? What support do they offer for allowing units built within plants to evade four of the five statutory conditions merely by partially complying with one of them? The petitioners do not claim the Clean Air Act mandates this result; they cannot even point to any provisions authorizing it. All they claim is that the Act does not specifically *preclude* their construction.

The petitioners are wrong even in this, however. We will show that the plant-wide "source" definition is prohibited by the provisions, legislative history, and purposes of the Clean Air Act. We will show that Congress specifically intended "major stationary source" to cover discrete major-emitting units regardless whether located on their own or within plants. We will show that for 10 years, until the 1981 rules change, EPA agreed. Because the plant-wide "source" definition is contrary to law and a sharp, unjustified break with long-standing regulations, the decision of the Court of Appeals should be affirmed.

STATEMENT OF THE CASE

The petitioners' statements of the case seriously misrepresent the legal provisions and regulatory history bearing on the Clean Air Act's new source review requirements. According to their version of the story, the curtain rises only with the 1977 amendments, which they assert to be indefinite, and with regulatory notices issued in 1979, which they claim were EPA's earliest pronouncement on the issue. Asserting the existence of a *tabula rasa* as late as 1979, the petitioners claim that the plant-wide definition of "stationary source" was EPA's first and considered construction of a term Congress left undefined. EPA's 1980 regulations are then characterized as only a brief and aberrant diversion from this construction, to which EPA returned in 1981.

This version of the story could hardly be further from the truth. The government, in particular, plays the unseemly role of a willing amnesiac.

In fact, the story of the Act's new source review requirements begins with the Clean Air Act of 1970 and with regulations dating from 1971. From 1970 to the present, the Act has mandated a specific state program for review of new and modified "stationary sources," and this term has always included discrete units of industrial production and pollution such as boilers and blast furnaces. From 1971 until the 1981 rules change at issue here, EPA's regulations faithfully tracked the provisions of the Act. Only in 1981 did EPA change course.

A. THE STATUTORY FRAMEWORK

1. The 1970 Act

New source review requirements covering discrete industrial facilities were first adopted in the 1970 Clean Air Act.[15] The Act directed each state to adopt a "State Implementation Plan" (SIP) to achieve National Ambient Air Quality Standards set at levels necessary to protect public health and the environment by 1975.[16] Certain specific elements, including a new source review procedure, were mandatory in each SIP. Under Sections 110(a)(2)(D) and 110(a)(4),[17] each SIP had to contain a procedure for reviewing the location of "any new source to which a standard of performance under section 111 will apply," and for blocking construction at any site where the source would prevent attainment or maintenance of the National Ambient Air Quality Standards.[18]

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[15] Pub. L. No. 91-604, 84 Stat. 1676. Citations to provisions subsequently amended are given to Statutes at Large; citations to sections which have not been changed are to the current codification.

[16] The National Ambient Air Quality Standards were to be set by EPA pursuant to Section 109(a) & (b), 84 Stat. 1679-80. "Primary" standards are to protect public health; "secondary" standards are to protect the natural and man-made environment. The 1975 deadline was fixed in Section 110 of the Act; limited extensions were available until 1977. Section 110(a)(2)(A), (e), 42 U.S.C. 84 Stat. 1680, 1682. The requirements for the State Implementation Plan were set forth in Section 110(a)(2)(A)-(H), 84 Stat. 1680-81. As currently amended, these provisions are codified at 42 U.S.C. §§7409, 7410.

[17] 84 Stat. 1680, 1681. In amended form these provisions are found at 42 U.S.C. §7410(a)(2)(D), (a)(4). See pp. 10-11, *infra*.

[18] See Hancock v. Train, 426 U.S. 167, 194 (1976).

The term "source" was explicitly defined in Section 111. Under Section 111(a)(3), a "source" was, and still is, "any building, structure, facility, or installation" which emits or may emit air pollution.[19] These terms denote discrete industrial units of production and operation.

After a New Source Performance Standard (NSPS) is set for a category of such sources under Section 111, they become subject to the locational review under Section 110(a)(2)(D) and (a)(4). Neither the NSPSs nor the locational review may be avoided through a plant-wide source definition. See *ASARCO v. EPA*, 578 F.2d 319 (D.C. Cir. 1978).[20]

Although significant progress was made under the 1970 Act, its requirements proved insufficient to protect the public health. The limited specific elements then required in each SIP, including the locational review for new sources, had turned out to be inadequate.[21] Nearly all the SIPs had projected that the health standards would be met on time. When the 1975 deadline passed, however, areas of the country containing

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[19] 42 U.S.C. §7411(a)(3).

[20] The only deviation from this rule was struck down in *ASARCO*. In New Source Performance Standards issued in 1974 for the nonferrous smelting industry, EPA partially adopted the plantwide "source" definition. The plantwide definition allowed *modifications* of the major smelting units (furnaces, copper converters, roasters, and the like) to evade the NSPSs by offsetting their emissions elsewhere in the plant. Wholly new units, however, remained subject to the standards. In *ASARCO*, this regulation was held contrary to the terms of Section 111(a)(3) and to the pollution-reducing purpose Congress had established for the NSPSs. *ASARCO* was not appealed, and no party to this case disputes the decision.

[21] As the 1977 Senate Report stated:

> A major weakness in the implementation of the 1970 Act has been the failure to assess the impact of emissions from new sources of pollution on State plans to attain air quality standards by statutory deadlines. States have permitted growth on the assumption that a deadline was sufficiently distant so that future emissions reductions could be made to compensate for initial increases. It can now be seen that these assumptions were wrong.

S.Rep. No. 127, 95th Cong., 1st Sess. 35 (1977), 3 *A Legislative History of the Clean Air Act Amendments of 1977* 1429 (Sen. Comm. on Environment and Public Works, Ser. No. 95-16, 1978) (hereinafter cited as *Leg. Hist.*).

more than two-thirds of the U.S. population still suffered air pollution in violation of one or more of the health standards.[22]

2. The 1977 Amendments

Work on comprehensive amendments to address the shortcomings of the 1970 Act began in 1975. One of the central problems before Congress was on what conditions to allow the construction of new or modified sources in areas where the 1975 deadline for attainment had passed unmet. A bill addressing this problem passed both the Senate and House and their conference committee in 1976,[23] but was killed by a post-conference filibuster on another issue.[24] To fill the gap until Congress could take final action, in December 1976 EPA adopted an interpretative regulation governing new sources, known as the "Emission Offset Interpretative Ruling."[25] Legislation closely patterned on the 1976 bill and the Offset Ruling was enacted in 1977.[26]

The 1976 bill contained a general bar on construction or modification of any "major emitting facility" (defined as any "stationary source" emitting more than 100 tons of pollution per year[27]) in an area with unhealthy air. The bill provided a narrow exception, however, for "a facility proposed for construction or modification at an existing site or plant." Such a facility could go forward if the firm met three conditions. The firm had to use the best technology, demonstrate

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[22] Report of the National Commission on Air Quality, pp. 3.3-20 through 3.3-33 (Preliminary Staff Draft, Jan. 15, 1981) (The Commission was established in 1977 under Section 323 of the Clean Air Act, 42 U.S.C. §7623, to report on progress under the Act.)

[23] S. 3219, reprinted in H.R. Rep. 1742, 94th Cong., 2d Sess. (1976). See 5 *Leg. Hist.* at 4287.

[24] The filibuster, led by Senator Garn, was focused on the program to protect air quality *better* than required by the federal health and welfare standards. See the floor debate, 5 *Leg. Hist.* at 4411-4500.

[25] 41 Fed. Reg. 55,524 (1976), J.A. 8.

[26] Pub. L. No. 95-95, 91 Stat. 685.

[27] S. 3219, §33 (adding §302(k) & (m)), 94th Cong., 2d Sess. (1976), 6 *Leg. Hist.* at 4686-88.

that its other sources are in compliance with applicable requirements, and offset the new facility's emissions by reducing pollution at other facilities by a greater amount.[28] The bill distinguished between "facilities," on the one hand, and "sites," "plants," and "facility locations," on the other hand.[29]

When this bill failed to pass, EPA adopted the Emission Offset Interpretative Ruling. 41 Fed. Reg. 55,524, J.A. 8. The ruling closely followed the 1976 bill. It allowed construction of major new and modified sources on conditions virtually identical to the 1976 bill. The Offset Ruling is discussed further at pages 16-17, *infra*.

Amendments to the Clean Air Act were enacted in 1977.[30] Congress extended the deadlines for meeting standards to 1982 for most areas, 1987 for others.[31] At the same time, Congress substantially strengthened the specific elements

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[28] S. 3219, §11, 6 *Leg. Hist.* at 4652-53. The provision required the proponent of such a facility to demonstrate (A) that "the best available technology . . . applicable to such proposed facility" will be used, (B) that "all existing facilities owned or controlled" by the same firm "are in compliance with an approved schedule and timetable for compliance," (C) that "total cumulative emissions from the facility location and the proposed facility will at no time increase," and (D) that "total allowable emissions from all existing and proposed sources at the facility location will be sufficiently less than the total allowable emissions from the existing sources . . . so as to represent reasonable further progress toward attainment of the applicable national ambient air quality standard."

[29] *Id.*

[30] Pub. L. No. 95-95, 91 Stat. 685. Its "nonattainment" provisions were contained in Sections 108 & 129, 91 Stat. 693-97, 745-50, codified at 42 U.S.C. §§7410, 7501-08.

[31] Section 172(a), 42 U.S.C. §7502(a). The extension to 1987 was limited to areas with special problems meeting standards for ozone or carbon monoxide. The 1982 and 1987 deadlines remain outside limits; SIPs are to provide for attainment "as expeditiously as practicable" but not later than these dates. To help deter states from again leaving the bulk of the necessary pollution reductions to the last minute and then once again falling short, the SIPs must provide for "reasonable further progress," Section 172(b)(3), 42 U.S.C. §7502(b)(3), defined as regular increments of emission reductions sufficient to meet the standards on time. Section 171(1), 42 U.S.C. §7501(1).

required in each SIP.[32] Foremost among these were expanded requirements for major new and modified sources. Amalgamating the provisions of the 1976 bill and the EPA Offset Ruling, Congress enacted the review and permit provisions of the current law. See Section 110(a)(2)(D), as amended, and new Sections 172(b)(6), 173, 42 U.S.C. §§7410(a)(2)(D), 7502(b)(6), 7503.

Each state was required to revise its SIP by 1979. In addition to the locational review mandated by the 1970 Act, Section 110(a)(2)(D) now requires each SIP to include a program for

> regulation of the modification, construction, and operation of *any stationary source*, including a permit program as required in parts C and D of this subchapter . . . .

42 U.S.C. §7410(a)(2)(D) (emphasis added). The permit program required by Part D is set forth in Section 172(b)(6), which provides that each SIP must "require permits for the construction and operation of new or modified major stationary sources in accordance with section 173. . . ." A "*major* stationary source" is defined as "any stationary facility or source" emitting at least 100 tons of pollution per year. Section 302(j), 42 U.S.C. §7602(j).

Section 173 sets forth the three conditions, drawn directly from the 1976 bill and the Offset Ruling, under which a state may issue a permit for construction and operation. Paragraph (1)(A) requires the owner of the major source to secure an

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[32] Forced to extend the attainment dates by the widespread failure to implement the necessary pollution controls, Congress was more convinced than ever that it was insufficient to rely solely on deadlines and progress requirements. Consequently, Congress required the SIPs to incorporate upgraded controls on existing stationary sources to represent "at a minimum," "reasonably available control technology." Section 172(b)(3), 42 U.S.C. §7502(b)(3). All other "reasonably available control measures" had to be taken. *Id.* Most important for this case, the SIP must contain an expanded and more stringent permit program for new and modified "major stationary sources."

emissions "offset" that accomplishes a net reduction in emissions.[33] Paragraph (2) requires compliance with the "lowest achievable emission rate" (LAER).[34] Paragraph (3) requires the source owner to demonstrate that its existing sources are subject to, and in compliance (or on schedules for compliance) with, their pollution limits.

The amendments provided a means for states to waive one, and only one, of the permit requirements. Under Section 173(1)(B) a state may eliminate the offset requirement if, pursuant to Section 172(b)(5), the state creates a "growth allowance."[35] A growth allowance is created by requiring extra emission reductions from existing sources, beyond those needed for bare attainment of the health standards. Under no circumstances, however, may a state waive the "lowest

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[33] Section 173(1)(A) requires that:

> by the time the source is to commence operation, total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources allowed under the applicable implementation plan prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 172) reasonable further progress (as defined in section 171). . . .

[34] The "lowest achievable emission rate" (LAER) is defined as equal to the lowest pollution rate actually being achieved by an existing source of the same type, or as equal to the lowest rate required of such a source by any state, whichever is lower. As an absolute floor, LAER may not allow more pollution than the applicable New Source Performance Standard (NSPS), if one has been set for that type of source. Section 171(2), 42 U.S.C. §7501(2). The legislative history indicates that the states and EPA may consider the cost of controls when determining LAER, but in view of the health interests at stake, they must give cost less weight than when setting NSPSs. See H.R. Rep. No. 294, 95th Cong., 1st Sess. 215, 4 *Leg. Hist.* 2682.

[35] Section 173(1)(B) allows a waiver of case-by-case offsets if:

> emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emission levels which exceed the allowance for growth permitted for such pollutant for such area from new or modified stationary sources under section 172(b). . . .

achievable emission rate" or company-wide compliance requirements. These requirements must be met by major new and modified sources even in a nonattainment area whose SIP has a growth allowance.

States seeking a deadline extension to 1987 must include an additional new source requirement in their SIPs. The state must prepare "an analysis of alternative sites, sizes, production processes, and environmental control techniques" for each new or modified "major stationary source." For the source to proceed, the analysis must demonstrate "that the benefits of the proposed source significantly outweigh [its] environmental and social costs." Section 172(b)(11), 42 U.S.C. §7502(b)(11). This most intense scrutiny of major new and modified sources reflects Congress' judgment that even the conditions imposed by Section 173 were inadequate if public health was to continue in jeopardy so long.

To govern during the interim period until the states revised their SIPs, Congress adopted the EPA Offset Ruling directly into law. Pub. L. 95-95, 129(a), codified as a note to 42 U.S.C. §7502. When complete SIPs are in place, their permit provisions take over.

If the required SIP revisions were not completed on schedule, the amendments provided that no "major stationary source" may be constructed or modified after July 1, 1979, if it would emit a pollutant for which an area has unhealthy air. Section 110(a)(2)(I), 42 U.S.C. §7410(a)(2)(I). Once the SIP is approved by EPA, the moratorium on major source construction returns if the state is not carrying out the plan. Section 173(4), 42 U.S.C. §7503(4).[36]

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[36] While the industry petitioners suggest dire economic consequences flow from the moratorium, the National Commission on Air Quality found it to be an effective spur to state action with little adverse economic impact: "[M]oratoriums continue to have little effect on new sources, but stimulate completion of required plan revisions." National Commission on Air Quality, *To Breathe Clean Air*, Finding 91, pp. 16-17 (1981).

3. The 1981 Amendments

The final chapter in the legislative story was the enactment of a special amendment to the Clean Air Act, the Steel Industry Compliance Extension Act,[37] in July 1981. The legislative history of this amendment reaffirms the established scope of the Act's permit provisions.

The steel amendment allows iron and steel companies more time to meet emission limits applicable to some of their existing sources, provided the companies meet certain carefully drawn conditions. The principal conditions are that they take certain steps to protect air quality in the interim, and that they put the money saved by deferring compliance into modernization of facilities. Section 113(e), 42 U.S.C. §7413(e), 95 Stat. 139-42 (1981).

The legislation was the product of an unusual direct negotiation between the steel industry, labor, the government, and environmentalists.[38] One article of this agreement was that modernization projects involving the construction or modification of units such as blast furnaces, coke ovens, and the like were each "major stationary sources" subject to the permit requirements of Section 173. See Brief of *Amicus Curiae* United Steelworkers of America.

This agreement is reflected in the House Report, which states:

> [T]he program to modernize facilities will also continue to include the application of lowest achievable emission rate technology (LAER) on the modernized facilities. . . .[39]

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[37] Pub. L. No. 97-23, 95 Stat. 139 (1981), codified as amendments to Section 113 of the Clean Air Act, 42 U.S.C. §7413.

[38] "The bill reflects an historic agreement hammered out last September between representatives of the steel companies, the steelworkers union, . . . the environmental groups, and the Environmental Protection Agency." 127 Cong. Rec. H2449 (daily ed. May 28, 1981) (remarks of Rep. John Dingell, chairman of the committee reporting the bill).

[39] H.R. Rep. No. 121, 97th Cong., 1st Sess. 12 (1981), reprinted in [1981] U.S. Code Cong. & Admin. News 63.

The Report then gives examples of the type of projects that would be subject to LAER and the other new source permitting requirements:

> It is anticipated that the industry will use the opportunity to modernize the American steel industry by building modern *continuous casters*, converting *open hearth shops* to *basic oxygen furnaces* or undertaking similar projects to improve the competitive posture of the industry.[40]

Each type of project mentioned is a unit within a plant, not a plant itself. The steel amendments, enacted just as EPA moved to abandon the unit-specific "source" definition, point in exactly the opposite direction.

B. THE REGULATORY HISTORY

From 1971 until the 1981 rules change, EPA's new source review regulations applied to individual units, regardless whether built at new sites or within existing plants. This is evident in regulations published in 1971, 1973, 1976, 1979, and 1980. A deviation from this course was proposed in 1979 but never promulgated; the regulations adopted in 1980 maintained the historical scope of the review provisions.

1. The 1971 and 1973 Regulations

EPA first issued regulations to implement the locational review in 1971. 40 C.F.R. Part 51, 36 Fed. Reg. 22,398, (1971).[41] Under the title, "Review of New Sources and Modifications," the regulations required each SIP to provide for review of "a new stationary source" or "an existing source which is to be modified." 40 C.F.R. §51.18(b), 36 Fed. Reg. 22,404. While no definition of "stationary source" was included in the regulations, reference obviously was intended to the statutory definition found in Section 111(a)(3). As

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[40] *Id.* (emphasis added).

[41] The regulations were first promulgated at 36 Fed. Reg. 15,486, (1971) as 40 C.F.R. Part 420. They were recodified later in the year.

intended and as applied, the 1971 regulations applied to individual industrial units.[42]

In 1973 EPA amended these regulations; in place of the term "stationary source," EPA used the terms "facility, building, structure, [or] installation" 38 Fed. Reg. 15,836 (1973). These are the terms used in the Section 111(a)(3) definition of "stationary source."[43]

2. The 1976 Offset Ruling

As mentioned above, when a filibuster killed the 1976 bill, EPA issued the "Emission Offset Interpretative Ruling" to fill the gap. 41 Fed. Reg. 55,524, J.A. 8. The ruling was an interpretation of the existing §51.18 regulations governing the locational review of the 1970 Act. *Id.* at 55,528, J.A. 20. The ruling set forth terms on which additional sources could be built or modified in areas that had failed to meet the health standards by the 1975 deadline.

As an interpretation of §51.18, the Offset Ruling incorporated those regulations' definition of a "stationary source" as a "facility, building, structure, [or] installation." Reflecting the title of the §51.18 regulations, the Offset Ruling applied to any " 'major' new source" or " 'major' modification." A new source or a modification was "major" if it would emit at least 100 tons of pollution per year. 41 Fed. Reg. at 55,528,

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[42] Respondents would be most surprised if petitioners denied this. Traditionally, the air pollution program had always regulated discrete units of production and operation. The "bubble" concept was not even *conceived* until 1972. For the earliest history of the concept, see ASARCO v. EPA, 578 F.2d 319, 322-25 (D.C. Cir. 1978).

[43] The regulations also used a fifth term after these four, "combination thereof." This term was added to deal with a special issue unrelated to this case: regulation of "indirect sources" such as airports and shopping centers. As stated by the preamble to the proposed regulations, indirect sources are "types of facilities, such as airports, amusement parks . . . [which affect] air quality . . . primarily by means of the mobile source activity associated with them." 38 Fed. Reg. 9599 (1973). The term "combination thereof" was added to encompass such sources. Congress subsequently limited EPA's authority to require state review of indirect sources, Section 110(a)(5), 42 U.S.C. §7410(a)(5). In 1979, however, the term "combination thereof" was reemployed to deal with a different problem. See note 45, *infra*.

J.A. 21.[44] Thus, under the Offset Ruling, new or modified industrial units were subject to review if they themselves would emit 100 tons per year, regardless whether they were located at new sites or within plants.

Like the 1976 bill, the Offset Ruling allowed such sources to be constructed or modified in unhealthy-air areas only so long as it met the state-of-the-art technology, company-wide compliance, and offset conditions. *Id.* at 55,528-29, J.A. 24-26.

3. The Regulations From 1977 to 1979

While states prepared the SIP revisions required by the 1977 amendments, EPA consistently implemented the Offset Ruling to apply to units within plants. In January 1979, EPA stated that this had been its "consistent application" since 1976. 44 Fed. Reg. 3277 (1979), J.A. 44. The Agency explicitly rejected industry requests to let otherwise major new and modified sources escape the three conditions of the Offset Ruling merely by obtaining an offset within the plant. "It is not enough that there be no net increase in emissions. . . ," EPA stated. *Id.* at 3276-77, J.A. 43-44.[45]

4. The 1979 Proposal

It is only now that we come to the point where the petitioners' version of the regulatory history begins. The

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[44] The "major" level for carbon monoxide was 1000 tons per year.

[45] In this notice EPA amended its definition of "stationary source" to read as follows: "any structure, building, facility, equipment, installation or operation (or combination thereof)." 40 C.F.R. Part 51, App. S, II(A)(1), 44 Fed. Reg. 3282, J.A. 46-47. The first six terms were intended to encompass industrial units. The term "combination thereof," first used for another purpose in 1973 (see note 43, *supra*), was now put to a new use. Now that a source's emission rate determined whether it was "major" and subject to review, EPA had found that some firms were attempting to evade review by subdividing their projects on paper. In this way they kept each part below the 100 ton threshold. The purpose of adding "combination thereof" to the source definition was to curb this tactic. EPA gave the following example: "This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements." 44 Fed. Reg. 3276, J.A. 42.

petitioners point out that in the January 1979 notice just discussed, EPA suggested that it would allow use of the plant-wide "source" definition in the context of a revised SIP that met all requirements of the 1977 amendments. 44 Fed. Reg. at 3277, J.A. 44-45. This suggestion was repeated in April and formally proposed in September. 44 Fed Reg. at 20,379; 44 Fed. Reg. at 51,933 (1979), J.A. 65-66. The petitioners further suggest that all EPA did in 1981 was promulgate this proposal. EPA Br. at 3; AISI Br. at 8-9.

The September 1979 proposal was never promulgated, however. When EPA completed the rulemaking in 1980, EPA rejected the proposal and retained the prior scope of new source review even for areas with complete SIPs.

Moreover, the the 1979 proposal did not go nearly as far as the 1981 rules change. The 1979 proposal would have allowed a plant-wide definition only within a complete SIP, and would have required the new unit's pollution increase to be *completely* offset. In contrast, the 1981 rules allow the plant-wide definition to be used even under the Offset Ruling and the construction moratorium, and they allow net pollution to increase, by 25-100 tons per year.[46]

5. The 1980 Regulations

In 1980, EPA rejected the 1979 proposal. The Agency retained the prior requirement that major-emitting units built within plants comply with the permit requirements, even within a complete SIP. EPA stated:

> The legislative history of the Act indicates that new source review was intended to be an important tool

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[46] See 44 Fed. Reg. at 51,933, J.A. 66. The January and April notices, moreover, did not go even as far as the September proposal. The January and April notices suggested allowing the *modification* of a unit within a plant to avoid new source review. This option, however, would never be available to a wholly *new* unit added to a plant. 44 Fed. Reg. 3277, J.A. 44-45; 44 Fed. Reg. 20,379. In the September notice, EPA did propose extending this option to completely new units, but still required that the emissions increase be completely offset. 44 Fed. Reg. 51,933, J.A. 65-66.

> in the drive towards attainment of the ambient air quality standards. . . . To realize this goal fully, Congress intended that new source review be applied to the greatest extent possible.

45 Fed. Reg. 52,697, J.A. 81-82. EPA quoted legislative history in which Congress expressed the important pollution-reducing functions of the requirements for lowest achievable emission rate technology and for company-wide compliance. 45 Fed. Reg. 52,697, J.A. 81. "Major stationary source," EPA concluded, must continue to be defined to encompass major-emitting units within plants. *Id.*[47]

C. THE 1981 RULES CHANGE

In March 1981, EPA proposed to change course radically and adopt an exclusively plant-wide definition of "source." 46 Fed. Reg. 16,280 (1981), J.A. 89. The Agency proposed to accomplish this result by defining all four terms which make up a "stationary source" — "building," "structure," "facility," and "installation" — to mean entire plants only. Proposed 40 C.F.R. Part 51, App. S II(A), §51.18(j)(1), §52.24(f), 46 Fed. Reg. at 16,282, J.A. 96.

The 1981 proposal went beyond even the rejected 1979 proposals. EPA no longer restricted the plantwide definition to states with fully approved SIPs; EPA adopted it for the Agency's own use under the Offset Ruling and the construction

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[47] In the wake of Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979), EPA changed the terminology of the "source" definition, but not its intent. *Alabama Power* held that "stationary source" may be defined only by the four terms found in Section 111(a)(3): "building, structure, facility, or installation." This erased the additional terms EPA had included in the definition in 1979: "equipment . . . operation (or combination thereof)." This was only a formal limitation, however, for the court had then held that EPA has the authority to define the four statutory terms in reasonable ways. 636 F.2d at 396. Consequently, in the 1980 rules EPA defined "installation" to mean "an identifiable piece of process equipment," i.e., an industrial unit. 40 C.F.R. §51.18(j)(1)(ii)-(iii), 45 Fed. Reg. 52,744 (1980), J.A. 87. If an installation had emissions exceeding 100 tons per year, it was a "major stationary source" subject to the permit provisions. *Id.* §51.18(j)(1)(v).

moratorium, which apply precisely where state plans are inadequate. Moreover, where the 1979 proposals had at least required that emissions increases be offset completely, the 1981 proposal allowed firms to create net emissions increases.

The proposal was strongly opposed in comments by public health, environmental, and civic organizations[48] and by several states.[49] It was nonetheless promulgated without change in October 1981. 46 Fed. Reg. 50,766 (1981), J.A. 97. In the promulgation notice, EPA claimed that the Clean Air Act does not require the specific new source review procedure set forth in Part D if the SIP as a whole projects reasonable further progress and attainment by the deadlines. EPA also contended that the plant-wide definition "simplifies" the regulations and eliminated a "disincentive" to plant modernizations which "in some cases" may reduce pollution despite failure to observe the permit conditions. As for the construction moratorium, which applies in places *without* a complete SIP, EPA defended the reduction in the moratorium's scope with the argument that pollution would not increase "significantly." 46 Fed. Reg. 50,767-69, J.A. 102-05, 109-110.

D. THE COURT OF APPEALS DECISION

In the Court of Appeals, the petitioning public health and environmental organizations challenged the exclusively plant-wide definition of "source" on three grounds: It was contrary

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[48] See comments of Natural Resources Defense Council (J.A. 141), Environmental Defense Fund and Citizens for a Better Environment (Chicago) (Court of Appeals App. [C.A.App.] 30), Citizens for a Better Environment (San Francisco) (C.A.App. 47), Northwestern Ohio Lung Association (C.A.App. 52), and League of Women Voters of the United States (C.A.App. 63).

[49] See Comments of Commonwealth of Pennsylvania (J.A. 122), and State of Maryland (J.A. 139). Pennsylvania stated that EPA's approach was "inadequate to assure attainment" and "short-sighted." Pennsylvania particularly criticized EPA's excessive reliance on projections of future attainment and interim progress: "[T]here is considerable uncertainty regarding the adequacy of the amount of emission reductions necessary to achieve the health related standards. This ambiguity makes the [reasonable further progress and attainment demonstrations] in many cases tenuous at best." J.A. 123-24

to the terms of the Clean Air Act, to its legislative history, and to the statute's fundamental purpose of rapidly reducing pollution in order to meet the national health standards. A permit program reaching individual major industrial units of production and pollution, we argued, was a specific requirement of the Act.

The court below relied mainly on the third of these arguments. The court held the case governed by both the underlying purpose and structure of the nonattainment program. On the Act's purpose, the court stated:

> The nonattainment program's *raison d'être* is to ameliorate the air's quality in nonattainment areas sufficiently to achieve expeditious compliance with the NAAQSs [National Ambient Air Quality Standards].

Id. at 726-27 (Chev. Pet. A-19) (footnote omitted). Concerning the Act's structure, the court added:

> We further note that the permit and moratorium provisions of Part D are wholly federal requirements imposed on the states. . . . The states do not retain flexibility to submit SIPs which provide for timely attainment of the NAAQSs, but which do not contain a permit program applicable to new or modified sources. Allowing the states large leeway to define the source to which the federal requirement applies is not easily reconciled with the statutory design.

Id. at 727-28 (Chev. Pet. A-19) (citation and footnote omitted). Accordingly, the court held that "EPA's regulatory change, its employment of the bubble concept to shrink to relatively small size mandatory new source review in nonattainment areas, is impermissible." *Id.* at 720 (Chev. Pet. A-4) (footnote omitted). The court vacated the 1981 change of rules.[30]

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[30] Since the lower court decision, the two national organizations representing top state and local air quality officials have strongly endorsed the need for the unit-specific definition of "source." See letters from the

(footnote continues)

In the lower court litigation, EPA *abandoned* an empirical claim that the petitioners now seek to revive: the claim that the unit-specific "source" definition discourages modernizations and retards pollution reduction. The government's Court of Appeals brief stated (at p. 12): "EPA did not rely on this as a basis for its decision." The court nonetheless addressed the issue in a footnote, observing that EPA had failed to produce "any study, survey, or support" for the proposition that new source review under the prior source definition "retard[s] improvement of air quality *in the aggregate*." 685 F.2d at 727, n.41 (Chev. Pet. A-18) (emphasis in original).[51] Thus, "EPA's decision to implement the bubble concept, if based on this rationale, would not rise to the level of reasoned decisionmaking." *Id.*[52]

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals vacating the 1981 redefinition of "stationary source" was correct and should

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(footnote continued)

State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials to the EPA Administrator, reproduced as Appendices A & B to the brief of *Amici Curiae* States. These officials, and the *amici* states, sharply disagree with EPA's claims that the plant-wide definition is consistent with the Clean Air Act and the achievement of its public health goals.

[51] All EPA had cited in the promulgation notice were a pair of conclusory, two-page comments each alleging one specific instance in which a modernization project was said to be retarded. (J.A. 131, C.A. App. 67.) The letters offer no evidence to support their specific claims, nor do they show that the plant-wide definition benefits air quality in the *aggregate*. See pages 44-48, *infra*.

[52] The lower court also vacated EPA's repeal of the "reconstruction" rule, an action ancillary to the redefinition of "source." 46 Fed. Reg. 50,771, J.A. 116-17, repealing 40 C.F.R. Part 50, App. S, II(A)(9) & (10), 40 C.F.R. §51.18(j)(1)(ix) & (x), 40 C.F.R. §52.24(f)(9) & (10). In certain industries (such as steel-making), old facilities are often replaced through *re*construction, rather than demolition of the old source and construction of a new one. Under the rule, a reconstruction was subject to new source permit requirments whenever its cost exceeded half the cost of an entirely

(footnote continues)

be affirmed. The Agency's plant-wide definition of "source" is contrary to the terms, legislative history, and purposes of the Clean Air Act. It is also a flat reversal of the long-standing prior rule, internally inconsistent, and unsupported by the record. Deference to EPA's construction is therefore completely unwarranted.

Section 111(a)(3) of the Clean Air Act defines "stationary source" as "any building, structure, facility, or installation" which emits pollution. These are terms which denote individual units of industrial production and pollution. Section 302(j) defines a "major stationary source" as any such unit which emits at least 100 tons of pollution per year. The plainest reading of this term is that a "major stationary source" is a large "building, structure, facility, or installation."

Since 1970, "stationary sources" planned for an area with unhealthy air have been subject to the locational review required under Section 110(a)(2)(D). In 1977 Congress expanded upon the locational review, by requiring each new or modified "major stationary source" to obtain a permit and meet rigorous pollution control conditions. These requirements were set forth in amendments to Section 110(a)(2)(D) and new Sections 110(a)(2)(I), 172(b)(6) & (11) and 173. Five pollution control conditions—a complete SIP, offsets, lowest achievable emission rate technology, company-wide compliance, and (after 1982) the cost-benefit analysis—must be met before a major new or modified source may be built.

(footnote continued)

new source. This gap-filling rule dated from 1975, before the 1977 amendments. See 40 C.F.R. §60.15, 40 Fed. Reg. 58417 (1975).

In 1981 EPA advanced just one reason for repealing it: That under a plant-wide "source" definition there would be no more reconstructions. A reconstruction plan, EPA observed, would only in the rarest case be so vast as to amount to more than half the cost of an entire new plant. 46 Fed. Reg. 50,767, J.A. 103. The Court of Appeals held that the repeal of the reconstruction rule had no independent basis, and vacated it along with the "source" definition. 685 F.2d at 728 (Chev. Pet. A-19, A-20) Citing SEC v. Chenery, 332 U.S. 194, 196 (1947) and Gulf States Util. Corp. v. FPC, 441 U.S. 747, 764 (1973), the court declined to address the arguments against the rule which EPA had neither discussed nor relied on, but which were advanced only by the industry intervenors.

The petitioners fail to cite any statutory provisions or legislative history which contradict this analysis. They cannot show any congressional intention to define "stationary source" as anything other than a "building, structure, facility, or installation." They cannot show that Congress intended a "major stationary source" to be anything more complicated than a large "stationary source."

The petitioners' argument reduces to a contention that a unit built within a plant may escape status as a "major stationary source" merely by partially offsetting its pollution with reductions elsewhere in the plant. In effect, they argue that Congress intended to let a source avoid meeting five carefully crafted conditions on construction merely by incompletely complying with one of the five conditions. Petitioners cite no statutory provisions to support this notion.

The Act, in fact, provides for precisely the opposite result. The offset requirement is the only condition on construction or modification of major stationary sources that the statute permits a state to waive. Section 173(1)(B). The other four conditions are mandatory. Under EPA's rules, however, offsets are the only condition that is even partly retained; all four other conditions are allowed to go completely by the boards.

The legislative history of the 1977 amendments reinforces these conclusions from the statutory text. The 1976 bill (killed only by a post-conference committee filibuster on another issue) specifically provided that major-emitting units ("facilities") built within plants had to meet the three pollution-reducing conditions. Subsequently, EPA implemented a nearly identical review procedure through its 1976 "Offset Ruling." In 1977, Congress adopted the conditions set forth in the 1976 bill and the Offset Ruling into law.

The legislative history of the 1981 amendments, which grant the steel industry certain concessions in order to promote modernization, further emphasizes the reach of new source review. Congress made it clear that modernization projects built within plants must comply with the lowest achievable emission rate and the other permit conditions.

Each of the five statutory conditions serves a specific purpose in the program to meet the health standards. The prospect of a construction moratorium promotes industry-state cooperation, rather than confrontation, in developing complete SIPs. The greater-than-even offset requirement serves the purpose of making growth contribute to, rather than hinder, clean-up of unhealthy pollution. The lowest achievable emission rate helps lower pollution and maximizes "room" for additional growth consistent with public health protection. The company-wide compliance requirement gives firms positive reasons to bring their own facilities into compliance, rather than to fight government enforcement actions. None of these purposes is served by exempting more than 90 percent of the intended objects of these requirements from their reach.

The EPA rules discriminate between established firms and newcomers to an area. The newcomer must meet all five statutory conditions because it builds at a new site. The established firm can expand its facilities while meeting only one of the five conditions, and only partially at that. Nothing in the Act or its legislative history suggests that Congress intended to create such a distortion of economic competition.

EPA's current position reverses the regulation which had been in effect since 1971 and which, as embodied in the 1976 Offset Ruling, was specifically adopted by Congress in 1977. EPA's current position is also internally inconsistent: The Agency says a plant-wide definition will be allowed only in the context of a complete SIP; yet EPA also uses the plant-wide definition under the Offset Ruling and the construction moratorium, which apply precisely in areas whose SIPs are *not* adequate.

The petitioners reassert in this Court an empirical claim that the government abandoned in the court below: a contention that the plantwide "source" definition promotes pollution-reducing modernizations. However, although EPA claimed during the rulemaking that the prior rules "discouraged" such modernizations in "some cases," the Agency completely failed to show that the prior rules were counter-productive in the *aggregate*. EPA did not even address this question.

Because the Agency "failed to consider an important aspect of the problem," *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S.Ct. 2856, 2867 (1983), the Court of Appeals properly held EPA's empirical claim arbitrary.

The Court of Appeals also correctly struck down EPA's repeal of the "reconstruction" rule. EPA's basis for this repeal was completely dependent on the validity of changing the "source" definition. Because it had no independent basis, the repeal of the "reconstruction" rule must fall as well.

For these reasons the decision below should be affirmed.

ARGUMENT

I. THE CLEAN AIR ACT REQUIRES EACH NEW OR MODIFIED INDUSTRIAL UNIT WHICH EMITS 100 TONS OF POLLUTION PER YEAR TO OBTAIN A PERMIT, REGARDLESS WHETHER IT IS LOCATED BY ITSELF OR WITHIN A PLANT

The petitioners' argument depends on the incorrect premise that the Clean Air Act does not define the meaning of the terms "stationary source" and "major stationary source" and does not specify the scope of the new source review and permitting provisions. Having assumed a statutory ambiguity, they then contend that EPA's interpretation should be deferred to. Their deference argument fails, however, because the provisions of the statute, the legislative history, and the congressional expressions of purpose are *not* ambiguous: In areas which do not meet the health standards, the Act's requirements apply to all major industrial units such as boilers and blast furnaces, regardless whether they are built at new sites or in pre-existing plants.[33]

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[33] "Although an agency's interpretation of the law under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute as revealed by its language, purpose, and history.'" Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979). A plea for deference "is not an argument

(footnote continues)

A. The Definitions of "Stationary Source" and "Major Stationary Source" Show That New and Modified Units Which Emit 100 Tons Per Year Are Subject to Review

The scope of new source review in areas with unhealthy air is apparent in definitions of "stationary source" and "major stationary source." A "stationary source" is defined in Section 111(a)(3) as "any building, structure, facility, or installation" which emits or may emit air pollution. The definition is disjunctive; an industrial project which is any one of these four terms is a "stationary source." The terms clearly denote the industrial units which make up a plant, not the plant itself. A "building" cannot be a plant-wide combination of buildings. A "structure" cannot be a plant-wide collection of structures. "Facility," as explained at page 33, *infra*, was the term used by Congress in 1976 specifically to mean new or modified units within a plant, as opposed to the plant itself. "Installation" is the very term EPA used for this purpose in 1980.

The Section 111(a)(3) definition governs the scope of the locational review established in 1970 by Section 110(a)(2)(D) and (a)(4). SIPs must contain "adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 of this title will apply," if the source would interfere with attaining the health standards. See pages 7-8, *supra*.

Congress used the same words, "stationary source," in the 1977 amendments to Section 110(a)(2)(D) which expanded the new source review requirements to their current form. As amended, Section 110(a)(2)(D) requires each SIP to contain,

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(footnote continued)

of sufficient force . . . to overcome the clear contrary indications of the statute itself," Securities & Exchange Comm'n v. Sloan, 436 U.S. 103, 117 (1978), and cannot prevail when "inconsistent with an obvious congressional intent," Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 95 (1973). An agency's demand for deference does not blunt the thoroughness of the Court's review of the law and legislative materials. Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968).

in addition to the locational review, "a program to provide for . . . regulation of the modification, construction, and operation of any stationary source, including a permit program as required in part[] . . . D of this subchapter."

The Part D permit program is established by Section 172(b)(6), which states that each SIP must require permits for the construction and operation of "new or modified major stationary sources" in accordance with the conditions set forth in Section 173. "Major stationary source" is defined in Section 302(j) as any "stationary facility or source" which emits at least 100 tons of pollution per year.[54]

The plainest reading of these provisions is that a "*major* stationary source" is simply a large "stationary source:" a "building, structure, facility, or installation" which emits 100 tons or more per year. This reading comports with the ordinary presumption that a word has the same meaning when used throughout a single statute.[55] It also makes perfect sense: Congress intended to target the 1977 amendments' more stringent pollution controls on larger sources; smaller ones remain subject only to the 1970 Act's locational review.

EPA claims that "[a]s a matter of linguistic analysis" all four of the Section 111(a)(3) terms "can be" defined as an

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[54] Section 302(j) defines two terms, "major emitting facility" (the term used in the Part C Prevention of Significant Deterioration provisions) and "major stationary source" (the term used in the Part D nonattainment provisions). The two terms are equated and defined as "any stationary facility or source" which emits or may emit 100 tons per year or more.

[55] This was the conclusion of the Court of Appeals in Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979), which held that the Section 111(a)(3) definition of source governs under the Prevention of Significant Deterioration (PSD) provisions of the Act, and that therefore EPA could not supplement the four statutory terms, "building, structure, facility, or installation" (see page 19, n.47):

> Given no expression of any contrary intent in the Act or in the legislative history, we must assume that the meaning of a particular term is to be consistent throughout the Act. This is especially true under the present circumstances, where the subject term prior to enactment of the controversial language had assumed a particular definition under closely related statutory provisions.

636 F.2d at 396.

entire plant. EPA Br. at 44, n.56.[56] Respondents are unaware of any techniques of "linguistic analysis" which can overcome

[56] EPA's reliance on *Alabama Power* as authority for this claim is totally misplaced. *Alabama Power* said that EPA could reasonably define *two* of the four terms ("facility" and "installation") "broadly enough" to encompass a plant. 636 F.2d at 396. The court did *not* suggest that the terms "building" or "structure" could be so defined. The court's selection of only the terms "facility" and "installation" as susceptible of a plant-wide definition strongly suggests that the court did not feel the two other terms could be so construed.

Under the court's holding, EPA *may* define "facility" and "installation" as plants, but nothing in the court's opinion suggests that EPA may define the terms "building" or "structure" as anything but units. Thus, the court's decision recognizes that the statutory definition of "source" is broad enough to cover two types of sources: individual units, which are covered by the terms "building" or "structure," and collections of units, which can be covered by the terms "facility" or "installation." Contrary to the government's final assertion in its note 56, that places the dual definition adopted for the unhealthy-air areas in 1980 well within EPA's authority. What EPA may not do, however, is define all four terms to mean *only* plants. In the 1980 PSD rules, EPA did just that. EPA compounded the mistake in the 1981 rules here under review, in which it abandoned the dual definition.

The reason to define two of the terms "broadly" was not to exempt projects from review, but to *assure* their review. This is why EPA had adopted the "combination" definition. See page 19, n.47, *supra*. The court ruled out the "combination" definition, but held the EPA had discretion to accomplish the same purpose by defining "facility" or "installation" as "broadly" as a plant. *Id.*

The court's "source" holding implicitly recognizes the statutory limit on the use of the "bubble" concept to avoid review—a limit which is not immediately apparent when the court's discussion of the "bubble" several pages later is read in isolation. Whether a "modification" occurs depends on whether the net emissions of a source have increased. The court specifically recognized, however, that netting is limited to increases and decreases within the same source: "[T]he offsetting changes must be within the same source, as defined by EPA." *Id.* at 402.

New source review is triggered only if a *major* source is modified. Under the dual definition suggested by the court, the source can be both the unit being changed and the plant in which it is located. If the plant as a whole is a major source, but the unit itself is not, then review is triggered by the change in the unit only if plantwide emissions increase. The firm may avoid review by reducing emissions elsewhere in the plant. But if the unit itself is a "major" emitter, then netting is limited to that unit alone. If its emissions increase, review is required. The same analysis applies to the addition of a wholly new unit within a plant; the firm may avoid review by reducing emissions elsewhere in the plant only if the new unit itself is not a "major" emitter. *(footnote continues)*

the plain meaning of these terms. All four terms can be used to mean units; the terms "building" and "structure" cannot reasonably defined as anything else.

EPA next argues that the Section 111(a)(3) definition has no application to the nonattainment provisions. EPA Br. at 42. The Agency is wrong. By virtue of the explicit reference in Section 110(a)(2)(D) and (a)(4), the definition has applied to new source review in areas with unhealthy air since 1970.[57]

EPA offers a final argument: that the 1977 conference committee dropped a provision from the Senate bill, Section 302(m), that would have explicitly incorporated the Section 111(a)(3) definition of "stationary source" into Section 302. EPA claims the deletion provides "compelling indications" of congressional intent. EPA Br. at 43-44.

EPA, however, has reported only part of the conference committee's action on the definitional section and hastily drawn an incorrect conclusion. The legislative history of Section 302 bears out our contention that a "major stationary source" is nothing more complicated than a large "stationary source" as defined in Section 111(a)(3).

Section 302(m) was included in the Senate bill to begin with because the bill did not use the term "major stationary source" at all. Rather, the Senate bill used the term "major emitting facility." "Major emitting facility" was defined in

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(footnote continued)

But if the unit itself is a "major" emitter, then netting is limited to that unit alone. If its emissions increase, review is required. The same analysis applies to the addition of a wholly new unit within a plant; the firm avoids review by reducing emissions elsewhere in the plant only so long as the new unit itself is not a "major" emitter.

Recognizing this limitation on the use of the bubble to avoid review allows one to join the court's "source" and "bubble" holdings in a manner that is both internally consistent and consistent with the Clean Air Act. This limitation was respected in EPA's 1980 dual definition; it has been tossed aside now.

[57] The Agency rests its case on the preface to Section 111(a), which states that the definitions given therein are "[f]or the purposes of this section." It does not say "for the purposes of this section *only*."

Section 302(k) as any "stationary source" which emits 100 tons or more per year. S.252, §302(k), 3 *Leg. Hist.* at 1593. "Stationary source" was then defined to have the same meaning as in Section 111(a)(3). *Id.*, §302(m). Thus the function of Section 302(m) was only to clarify that "major emitting facility" meant a building, structure, facility, or installation which emits 100 tons or more per year.[58]

The House bill used the term "major stationary source," which was defined as "any stationary facility or source" which emits 100 tons or more per year. H.R. 6161, §302(o)(1), 4 *Leg. Hist.* at 2905. The House bill and its legislative history are devoid of any indication that this definition meant anything other than its plain reading suggests: a large "building, structure, facility, or installation." In the House bill, there was simply no need for another provision to define "major stationary source."[59]

The conference committee described both the Senate and House provisions in identical terms: "any stationary source" which emits 100 tons per year.[60] The committee then adopted *both* terms. It equated "major emitting facility" and "major stationary source" and defined both as "any facility or source" emitting 100 tons or more per year. Section 302(j), 42 U.S.C. 7602(j). The conference report indicates that the committee intended to adopt the Senate's definitions: The bill "[d]efines

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[58] Any doubt about the Senate bill's intent is dispelled by the legislative history of the permit provisions, which clearly shows that "major emitting facility" term was intended to include to new and modified units built within plants. See page 33, *infra*.

[59] Any doubt about the scope of the term "major stationary source" is dispelled by looking at the 1976 House bill, where the definition originated. The definition first appeared in provisions giving certain sources extensions of compliance deadlines on condition that they pay penalties. The definition explicitly included "a source listed as provided in section 111," *i.e.*, "stationary sources" as defined in 111(a)(3). See H.R. 10498, §121(a)(3) as reported by the House Committee in 1976, 7 *Leg. Hist.* at 6880. See also the legislative history of the House bill's permit provisions, pages 35-36, *infra*.

[60] H.R. Rep. No. 564, 95th Cong., 1st Sess. 172, 3 *Leg. Hist.* at 552.

major stationary source and major emitting facility as defined in the Senate bill."[61]

Thus, far from providing "compelling indications" to support EPA, the legislative history of the "major stationary source" definition reiterates that units within plants are not exempt from permit requirements.

B. Petitioners' Construction Conflicts With the Terms of the Statutory Offset Waiver

The Clean Air Act establishes five conditions which must be satisfied before a "major stationary source" may be constructed or modified in an area with unhealthy air: A complete SIP, net reduction offsets, the lowest achievable emission rate, company-wide compliance, and (in areas with 1987 extensions) a cost-benefit analysis. If built at a new site, a new project that will emit 100 tons or more per year is a "major stationary source" and is subject to the five conditions. But under EPA's construction, if the same project is built within the confines of an existing plant, and if it *partially* complies with the offset condition, then is not a "major stationary source" at all. It may ignore the four other conditions entirely.

EPA's construction produces a result completely opposite that provided by the statute. Even when a SIP contains sufficient room to accomodate new source emissions, the Act allows a state to waive only one of the five conditions: the offset requirement. Section 173(1)(B). See page 12, *supra*. The other permit conditions may not be waived even though the plan assures attainment of the health standards by the deadlines. EPA's 1981 rules, however, retain the offset requirement, the only condition the Act allows to be waived. The rules allow the other four conditions, which are unwaivable under the Act, to go completely by the boards.

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[61] *Id.*

C. The 1977 and 1981 Legislative History Confirms That "Major Stationary Source" Includes Large Units Built Within Plants

1. The 1977 Nonattainment Amendments

The same conclusion follows from the legislative history of the 1977 amendments to the Act. The current permit provisions originated in 1976 legislation to amend the Act. This bill proceeded as far as conference committee agreement, but failed to become law because of a last-minute filibuster on another issue. To tide over until Congress could complete action the following year, EPA then adopted the "Offset Ruling" discussed above. In 1977, Congress amalgamated the 1976 bill and the EPA ruling into the current law. From beginning to end, the permit provisions applied to the major new and modified units built within plants, not just to plants themselves.[62]

(a) The 1976 Bill. The 1976 bill provided only a limited exception from the general growth prohibition of the 1970 Act. It did not allow construction of major emitting facilities at *new* sites under any circumstances. It allowed the addition of "a facility proposed for construction or modification at an existing site or plant," but only if the firm wishing to build the facility demonstrated that the "best available control technology," company-wide compliance, and offset conditions were met. S. 3219, §119, 94th Cong., 2d Sess. (1976), 5 *Leg. Hist.* at 4312.

The bill clearly distinguished between "facilities," on the one hand, and "sites," "plants," and "facility locations," on the other hand. *Id.* Under the terms of the bill there was absolutely no room for use of an exclusively plant-wide "source" definition to evade these requirements.

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[62] Where, as here, legislation was developed in a continuous, integrated effort spanning two Congresses, the legislative history of the prior Congress is a relevant source for insight into the meaning of the final legislation. See Seatrain Shipbuilding Corp. v. Shell Oil Corp., 444 U.S. 572, 596 (1980); FMC v. Seatrain Lines, 411 U.S. 726, 736 (1973).

(b) **The Offset Ruling.** After the 1976 bill failed to pass, EPA issued the Offset Ruling. Patterned after the 1976 legislation, the ruling allowed " 'major' new sources" and " 'major' modifications" to be constructed only upon compliance with the three technology, compliance, and offset conditions. In previous regulations which the Offset Ruling interpreted, a "new source" was defined as a new "facility, building, structure, [or] installation" and a "modification" was a pollution-increasing change in such a source. 41 Fed. Reg. at 55,528, J.A. 21.

Further evidence that the ruling applied to such units is apparent in the ruling's discussion of "internal" and "external" offsets. *Id.* at 55,526, 55,529 J.A. 15, 30. (An "internal" offset is an emission reduction from another source at the same plant; an "external" offset is one from another source at another site.) Internal offsets do not *exist* unless "sources" are units within plants: If "source" meant plant, then internal reductions would be used to avoid the permit process to begin with, and the offset requirement would never come into play.

In addition, the ruling applied to a new source "even though such source may replace an existing source with the result that the net additional emissions are less than [major] amounts." Such a source is subject to the LAER requirement and the other permit conditions. *Id.* at 55,528, (J.A. 22). For two reasons, this passage shows that "source" means units within plants. First, if "source" meant plant, then this project *would* be able to avoid review by keeping "net additional emissions" below major levels. Yet this is expressly prohibited. Second, as EPA itself still recognizes (46 Fed. Reg. 50,767, J.A. 103), whole plants are almost never replaced. It is units within plants that are replaced. Thus the passage makes sense only if it refers to replacement of units within plants.

(c) **The 1977 Amendments.** In 1977, both the Senate and House enacted bills that required major new and modified units to obtain permits.

In the Senate, the Environment and Public Works Committee began its deliberations with a bill whose new source

permit provisions were identical to those of the 1976 conference committee bill. S. 252, §11, 5 *Leg. Hist.* at 3605-06. The committee addressed the following question: "Should the exception [from the growth ban] be available only for expansion at existing sites, or also for the construction of new facilities at new sites?" A Section-by-Section Analysis of S. 252 and S. 253 Clean Air Act Amendments, 5 *Leg. Hist.* at 3873. The committee opted to extend the exception.[63]

The committee maintained the three conditions of the 1976 bill and the Offset Ruling with only one significant change: Like the final legislation, the Senate bill provided that a state may waive the offset requirement if it revises its SIP to accomodate the extra emissions.[64] The committee provision was adopted by the full Senate.

The House Interstate and Foreign Commerce Committee reached the same result by adopting the EPA Offset Ruling directly into the law. H.R. 6161, §117 (adding §127(b)(2)), 4

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[63] To accomplish this, the bill used the term "major emitting facility" alone, dropping the limiting reference to "a facility proposed for construction or modification at an existing site or plant." S. 252, §13 (as reported by the committee), 3 *Leg. Hist.* at 632.

Introducing the bill on the floor, Senator Muskie made clear the limited nature of this change and the meaning of the term "major emitting facility." He said:

> This year the issue that drew the greatest attention during the working sessions of the committee was the issue of new emissions in areas exceeding standards. The provision contained in the bill reported by the Committee last year dealt only with the expansion of existing facilities in such areas.
>
> The committee this year determined that a broadening of that provision was necessary so that new sources, without any existing facilities in the area, could still enter the area and construct new facilities under carefully limited procedures and meeting stringent requirements. The committee adopted a provision which provides protection for air quality while at the same time allowing new sources to be constructed.

3 *Leg. Hist.* at 711. There is absolutely no basis for EPA's suggestion (Br. at 45) that term "facility" had been converted to meaning "plant."

[64] S. 252, §13(g)(3) (as reported by the committee), 3 *Leg. Hist.* at 634-35.

Leg. Hist. at 2331-32. For future application once SIPs were revised, the committee modified the EPA ruling in only one significant respect; like the Senate, it provided for the offset waiver. *Id.*, §127(c)(5)(A), (d)(1), 4 *Leg. Hist.* at 2333, 233637. The committee provision was adopted by the full House. 4 *Leg. Hist.* at 3216.

The conference committee melded the two bills into the current statutory language without any suggestion of a change in the meaning of "source." In post-conference Senate debate, Senator Muskie succinctly stated the universally shared understanding:

> I should note that the test for determining whether a new or modified source is subject to the EPA interpretative regulation [the Offset Ruling]—and to the permit requirements of the revised implementation plans under the conference bill—is whether the source will emit a pollutant into an area which is exceeding a national ambient air quality standard for that pollutant—or precursor. Thus, a new source is still subject to such requirements as "lowest achievable emission rate" even if it is used as a replacement for an older facility resulting in a net reduction from previous emission levels.

3 *Leg. Hist.* at 355-56.[65]

Against this entire legislative history, the petitioners offer a single passage from the 1977 House report stating that the nonattainment amendments have two main purposes:

> (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow states greater flexibility for the former purpose than EPA's present interpretative regulations afford.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 211, 4 *Leg. Hist.*

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[65] See also the statement of Rep. Paul Rogers, chairman of the House subcommittee responsible for the legislation, when introducing the conference agreement to the full House. 3 *Leg. Hist.* at 319.

at 2678. From this generally-worded passage the petitioners assert that EPA has a broad authority to change the "source" definition—and, by implication, *any* aspect of the nonattainment provisions. EPA Br. at 23, AISI Br. at 23-24, Chev. Br. at 14-15.

The quoted passage says nothing of the kind. It introduces a discussion of the permit provisions which shows that Congress intended precisely the opposite of the petitioners' position. The pages of the House report that follow plainly show that the committee, when referring to "greater flexibility," had in mind just two specific changes in the EPA Offset Ruling.

First, where the EPA Offset Ruling required offsets in every case, Congress provided for the state's option to waive offsets under Section 173(1)(B). This option, in fact, is described under the heading "State Flexibility." *Id.* at 213, 4 *Leg. Hist.* at 2680.

Second, Congress relaxed the Offset Ruling's baseline for calculating the amount of offset credit gained by reducing emissions at an existing source. The Offset Ruling had limited offset credit to reductions below "reasonably available control measure" levels. Congress provided that the offset baseline should be the emission level allowed by the current SIP.[66] This had the effect of allowing more "room" for new emissions.

The 1977 amendments thus increased the states' flexibility in two very concrete ways. Nothing discussed in these pages of legislative history either changes the definition of a "source," or authorizes EPA to change it.[67]

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[66] Pub. L. No. 95-95, §129(a), codified as a note to 42 U.S.C. §7502.

[67] The same is true of petitioners' other, even more general quotations from the legislative history. These passages do no more than recognize (1) the balance between clean air and economic growth struck by the extension of the attainment deadlines, and (2) the great flexibility which the states retain to manage their programs as they see fit within the minimum requirements of the Clean Air Act. None of these passages can be read to support the plant-wide "source" definition.

2. The 1981 Steel Amendments

Congress reiterated the meaning of "source" in the 1981 Steel Industry Compliance Extension Act, described at page 14, *supra*. These amendments were explicitly the product of an agreement between the steel industry, the steelworkers' union, the government, and environmentalists. The amendments allow steel firms to defer certain existing source compliance dates provided they put the money saved thereby into modernizations. To emphasize that these modernizations projects are major new or modified sources subject to the permit requirements, the House report stated explicitly that projects such as the construction or modification of continuous casters, open hearth shops, and basic oxygen furnaces—all discrete units within steel plants—continue to be subject to the lowest achievable emission rate requirement. See pp. 14-15, *supra*. See brief of *Amicus Curiae* United Steelworkers of America.

In the court below, EPA *admitted* that the legislative history of the steel amendment "do[es] indicate that Congress thought new source review would apply to facilities within a plant." Court of Appeals brief for EPA at 19. EPA should not be allowed to gainsay this now.

D. The Statutory Purposes Are Incompatible With The Plant-Wide "Source" Definition

The five conditions on construction or modification of "major stationary sources" each serve a specific congressional purpose. Each of these purposes is violated by allowing nearly all the intended objects of the permit provisions to escape them.

The plainest purpose of the permit provisions is that served by the offset requirement: Making the construction of major new sources a force for reducing pollution rather than increasing it. Observing that plant-wide "source" definition eliminated the requirement for net reductions in pollution, the Court of Appeals found that definition contrary to law. 685 F.2d 718, 720, 726-27 (Chev. App. A-4, A-20). The court followed settled principles for construing a remedial statute which seeks to protect public health from hazards over which

people have no personal control. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980); *United States v. An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 798 (1969); *United States v. Dotterweich*, 320 U.S. 277, 280 (1943).[68]

The other statutory conditions each serve specific congressional purposes as well. The House report states that the lowest achievable emission rate requirement was adopted because "in light of the adverse air quality and health consequences of this new pollution, the committee concluded that all feasible efforts to reduce or control this new pollution should be mandated." The committee concluded that the requirement was also necessary to promote economic growth: "[M]aximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth." In addition, the requirement furthered the objective of improving pollution control technology: "[T]he technology-forcing purpose of the act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas." See H.R. Rep. No. 294, 95th Cong., 1st Sess. 215, 4 *Leg. Hist.* at 2682.

Congress intended the requirement for company-wide compliance to be a major new incentive for enforcement. Congress had found that a surprising number of existing sources still were out of compliance. For example, in 1975 House hearings, the chief executives of the five major firms in the steel industry admitted that they did not have a *single* plant where all sources were in compliance. See H.R. Rep. No. 294 at 210-11, 4 *Leg. Hist.* at 2677-78. The enforcement resources of the states and EPA had proved inadequate, especially where firms saw financial advantages in delaying compliance. By making compliance at existing sources a

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[68] As this Court stated in *Dotterweich*, 320 U.S. at 280:

> The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument and not merely a collection of English words.

precondition for permission to build new ones, Congress sought to turn the enforcement incentives around.

The purpose of the cost-benefit analysis required of major new and modified sources locating in areas with 1987 extensions is evident on the face of the provision. Congress intended that in areas with the longest delays in meeting health standards, new pollution sources must be subjected to the most exacting scrutiny.

Finally, the principle purpose of the construction moratorium was to give states and industry a common interest in finishing the development and adoption of a complete SIP. As the National Commission on Air Quality concluded, the moratorium has served this purpose effectively with little actual economic disruption.[69]

None of these purposes are served by exempting nearly all major new and modified units from status as "major stationary sources." For these reasons as well as those cited by the Court of Appeals, the plantwide definition contravenes the purposes of the Act.

One last purpose—a purpose Congress surely did not have—requires discussion. The EPA rules significantly distort competition by giving established firms a regulatory edge over newcomers. Consider a situation in which two firms perceive a profitable opportunity to expand in a particular area. The competitors are similarly situated, with but one difference: One firm is new to the area and must build its facility at a new site. The other firm already has a plant there and can

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[69] See page 13, *supra*. The petitioners complain that they cannot build even pollution-reducing replacements where the construction moratorium applies. This, however, is what Congress intended. See the statement of Senator Muskie, quoted at page 36, *supra*. If the petitioners desire a different rule, they must obtain an amendment of the statute from Congress.

Moreover, the "source" definition the petitioner attempt to defend does not limit them to pollution-*reducing* replacement projects. Rather, it explicitly allows contruction of projects which will *increase* plant-wide pollution. Thus if EPA's rules stand, pollution increasing projects will be allowed to go forward even in an area which has completely failed to develop a SIP.

build its new facility within the plant. The newcomer's project is a "major stationary source" and cannot be built unless all five statutory conditions are met. The established firm, however, needs only to secure a partial offset within the plant to avoid its project's being classified a "major stationary source" altogether. If both firms are subject to the same regulatory regime (as the statute requires), they remain similarly situated. Under EPA's rules, however, the even-handed character of the Clean Air Act's requirements is systematically skewed. The petitioners do not suggest any reason to believe Congress intended such a result.

E. There Is No Conflict With *Train* or *Union Electric*

The petitioners argue that a definition of "major stationary source" reaching major-emitting units within plants conflicts with this Court's decisions in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), and *Union Electric Co. v. EPA*, 427 U.S. 246 (1976). These cases, they claim, give a state freedom to choose *any* path to attainment of the health standards that it wishes, regardless of specific minimum requirements of the Clean Air Act. EPA Br. at 36, AISI Br. at 19, Chev. Br. at 16-17.

Train and *Union Electric*, however, do not go so far. *Train* recognizes that in addition to demonstrating timely attainment of the health standards, the states' programs must also "satisf[y] the standards of 110(a)(2)." 421 U.S. at 79. Similarly, *Union Electric* states that EPA must approve a state's plan "if it meets [the] eight specific criteria" set forth in Section 110(a)(2). 427 U.S. at 250. The states have a wide latitute to choose the "mix of emission limitations" (*Train*, 421 U.S. at 79), but this latitude does not include the authority to waive specific requirements of the Act.

By virtue of subparagraph 110(a)(2)(D), since 1970 the minimum requirements of Section 110(a)(2) have included new source review requirements reaching units within plants. As amended in 1977, subparagraph (D) incorporates into Section 110(a)(2) the specific permit requirements of Sections 172(b)(6) and 173. While the states retain control over many particulars of their SIPs under the 1977 amendments, this is

one requirement they may not waive. Because new source review reaching major units within plants is a requirement of Section 110(a)(2), there is no conflict with *Train* or *Union Electric*.

Under this Court's deference cases (including *Train* and *Union Electric*) an agency's construction must be rejected if found inconsistent with the law. We have shown that the plant-wide definition conflicts with the statutory terms, the legislative history, and the congressional purpose. For these reasons, the 1981 rules change must struck down.

II. EPA'S NEW CONSTRUCTION IS A SHARP BREAK WITH THE LONG-STANDING PRIOR RULE, INTERNALLY INCONSISTENT, AND THE PRODUCT OF FAILING TO CONSIDER AN IMPORTANT ASPECT OF THE PROBLEM

The Agency's current interpretation is a flat contradiction of a prior interpretation held for 10 years and twice ratified by Congress. The current interpretation is also internally inconsistent; EPA asserts that the plantwide definition may be used only within a complete SIP, but EPA uses it under the Offset Ruling and the construction moratorium. To the extent that EPA asserts an *empirical* justification for its rules change, the Agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S.Ct. 2856, 2867 (1983), and failed to support even its partial claims with facts in the rulemaking record. The petitioners therefore fail every test for deference to an Agency's construction.

A. The 1981 Rules Reversed the Long-Standing Prior Interpretation

For areas which do not meet the health standards, EPA's effective rule through 1981 was that "stationary source" includes industrial units of production and operation, regardless whether located at new sites or within pre-existing plants. This was the rule since issuance of the first regulations in 1971. See pages 15-19, *supra*.

Moreover, this was the rule embodied in the 1976 Emission Offset Interpretative Ruling which Congress adopted in the 1977 amendments. The 1976 ruling applied to major new and modified units within plants. The ruling was patterned after the 1976 clean air bill which failed to pass only for other reasons. In turn, the ruling was the basis for the 1977 amendments. See pages 33-36, *supra*.

This Court has frequently held that the reversal of a long-standing administrative construction is a strong sign that deference is not appropriate. *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 (1979) (agency's "present position is flatly contradicted by its past actions"). See also *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 93-94 (1973).[70] These principles weigh heavily against the abrupt 1981 reversal.

The Court has also frequently held that great deference is due to an agency interpretation which is contemporaneous with the enactment of the legislation. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961). Deference is particularly in order if the agency plays a role in developing the legislation and if Congress shows that it was aware of and approved of the agency view. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982); *Miller v. Youakim*, 440 U.S. 125, 146 (1979); *Zuber v. Allen*, 396 U.S. 168, 192 (1969).[71] These principles weigh strongly in favor the unit-specific definition which was ratified by Congress in 1976.

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[70] Even if EPA were able to show that its rules did embody the exclusively plant-wide at some time prior to the 1981 change, its present construction could not be rescued. "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." FMC v. Seatrain Lines, 411 U.S. 726, 745 (1973).

[71] *Vogel* closely parallels this case. The statutory provision at issue there was adopted some years before at the urging of the Treasury Department. In *Vogel* the Department urged on the Court an interpretation for this provision contrary to the interpretation the Department had expressed to Congress in pressing for its enactment.

B. The Rationale for the 1981 Change Is Internally Inconsistent

The petitioners' principal defense for the plant-wide definition is that a state will have to show that its SIP still guarantees reasonable further progress and timely attainment of the standards. The petitioners, however, do not explain why it is even colorably legal to use the plantwide "source" definition under the Offset Ruling and the construction moratorium. These apply precisely in areas *without* adequate SIPs demonstrating progress and attainment. These are the areas lacking *any* safety net, however imperfect.[72]

C. EPA Failed to Consider Whether the Plant-Wide Definition Increases Pollution in the Aggregate

The petitioners attempt now to revive a factual allegation that EPA conceded in the Court of Appeals: the claim that the prior "source" definition could retard pollution control progress by discouraging modernization projects. This Court should reject the claim, first, because it was conceded below and, second, because EPA failed even to consider an essential element of its claim: the *aggregate* effect of changing the "source" definition.

In its proposal notice, EPA asserted that the prior "source" definition "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." In areas operating under under approved SIPs or the Offset Ruling, EPA claimed that pollution-reducing replacement projects were being delayed. In areas under the construction moratorium (because the states do not have acceptable SIPs), EPA claimed that some such projects were being blocked altogether. 46 Fed. Reg. 16,281, J.A. 93-94.

Challenged by commenters to support these factual claims with evidence, EPA retreated somewhat by the time of

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[72] EPA in fact admits that the plantwide definition allows pollution to *increase* in areas under the construction moratorium (but not, the Agency claims, "significantly"). 46 Fed. Reg. at 50,769, J.A. 109-110.

promulgation. In the final notice EPA continued to claim that there was a "disincentive" for replacement projects, but now asserted only that such replacements might reduce pollution "in some cases." 46 Fed. Reg. 50,768, J.A. 104-05. All EPA cited to support this "some cases" claim was a pair of anecdotal, two-page letters from industry commenters.[73]

It is important to understand what EPA did *not* claim. The Agency did not assert that the plant-wide "source" definition would reduce pollution *overall*; this issue, in fact, EPA did not address at all. EPA claimed only that some unspecified fraction of replacement projects were being delayed by unspecified lengths of time, and that there could be pollution reductions in "*some*" such cases. EPA made no effort to show what percentage of projects covered by the rules change would be replacements (versus expansions). EPA made no effort to determine in what fraction of the replacement cases would pollution be reduced. In short, EPA made no effort to show that the prior "source" definition was counter-productive in the *aggregate*.

Before the Court of Appeals, EPA abandoned even the "some cases" claim. The Agency's brief stated: "EPA did not rely on this [the alleged effect on modernizations] as a basis for its decision." Court of Appeals Br. for EPA at 12. The court nonetheless addressed the issue briefly in a footnote, observing that

> in abandoning its earlier [pre-1981] position, EPA did not cite, nor have we found in the record, any study, survey, or support for the opposite position, now tendered by EPA, that the dual definition would indeed retard improvement of air quality *in the aggregate*. Therefore, EPA's decision to implement the bubble concept, if based on this rationale, would not rise to the level of reasoned decisionmaking for EPA "has some burden . . . to show that a regulation once considered to [effectuate policy] efficiently no longer can be expected to do so." State Farm Mut.

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[73] J.A. 131, C.A. App. 67.

> Auto. Ins. Co. v. Department of Transportation, 680 F.2d 206, 231 (D.C. Cir. 1982). Speculation is not enough.

685 F.2d at 727, n.41 (Chev. Pet. A-18) (emphasis in original).

Since EPA conceded the claim in the court below, this Court should reject the petitioners' attempt to revive it now. Even if the Court decides to consider the claim, however, it should be rejected on the merits. The petitioners cannot produce anything in the record other than unsupported anecdotes to buttress even the limited "some cases" claim. The record is so weak even on this limited claim that the government has felt it necessary to make up a totally speculative, *post hoc* hypothetical. EPA Br. at 30-31.[74] Even this hypothetical fails to address the aggregate consequences of the rules change.

At this point, the petitioners are reduced to vaguely contending that the Court of Appeals applied an improper standard of review. But in *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S.Ct. 2856 (1983), this Court stated:

> Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

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[74] Courts will not consider *post hoc* rationalizations of counsel. Burlington Truck Lines v. United States, 371 U.S. 156 (1962).

The petitioners also make vague allegations about long permitting delays and large cost increases. See EPA Br. at 29, AISI Br. at 25-26. But the facts are otherwise. According to the report of the National Commission on Air Quality, the average time needed to obtain a nonattainment permit was just three to five months, well within the corporate planning horizon for any project large enough to be a "major" source. The Commission also concluded that the permit requirements were unlikely to have any major effect on siting decisions. National Commission on Air Quality, *To Breathe Clean Air* 135, 139-40 (1981). (For background on the Commission, see page 9, n.22, *supra*.)

> implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 2867. The Court of Appeals was certainly correct to hold that the the aggregate impact of the rules change was "an important aspect of the problem" and that EPA's failure to consider it rendered the rules change arbitrary. Indeed, even the limited "some cases" claim is so insubstantially supported that it cannot pass the "counter to the evidence" and "so implausible" tests.

III. THE REPEAL OF THE "RECONSTRUCTION" RULE HAD NO BASIS INDEPENDENT OF THE REDEFINITION OF "SOURCE" AND MUST FALL AS WELL

The Court of Appeals also vacated EPA's repeal of the "reconstruction" rule, holding that the repeal had no basis independent of the change to an exclusively plant-wide "source" definition. The court refused to consider arguments against the rule which were not considered by EPA but which were pressed nonetheless by the industry intervenors. 685 F.2d at 728, n.43 (Chev. Pet. A-20). Petitioner AISI has made these arguments again. AISI Br. at 32-34. They are without merit.

In certain industries (such as the steel industry) old facilities are replaced often by rebuilding them rather than demolishing and replacing them. The reconstruction of a coke oven battery, for example, may be so extensive as to involve replacing everything but the old source's foundation. See page 22, n.52, *supra*.

If a major existing source is demolished and replaced, the replacement is a major new source subject to the permit requirements, even if it reduces pollution. See the statement of Senator Muskie, quoted at page 36, *supra*. The purpose of the "reconstruction" rule is to prevent industries such as the steel industry from perpetually evading the pollution control requirements of the Clean Air Act by reconstructing their sources rather than demolishing and replacing them.

EPA fully considered and rejected AISI's arguments in 1980. 45 Fed. Reg. 52,703 (1980). The Agency repealed the

rule in 1981 only because adoption of the plantwide "source" definition rendered it vestigial. Even as EPA repealed the "reconstruction" rule for nonattainment new source permitting, the Agency *retained* the rule for the purposes of the New Source Performance Standards. 46 Fed. Reg. 50,769, n. 7 (1981), J.A. 110.

The Court of Appeals properly refused to consider AISI's additional arguments on which EPA had not relied. As stated in *SEC v. Chenery Corp.*, a court "may not supply a reasoned basis for the agency's action that the agency itself has not given." 332 U.S. 194, 196 (1947). This Court recently reiterated the *Chenery* principle in *MVMA*, *supra*, 103 S. Ct. at 2867. The Court thus should affirm this portion of the lower court's holding, as well as its vacating of the plant-wide "source" definition.

CONCLUSION

The plant-wide definition of "stationary source" conflicts with the terms, legislative history, and purpose of the Clean Air Act. The redefinition was a sharp reversal of the decade-long congressional and administrative rule. Its legal rationale is internally inconsistent. To the the extent EPA has tried to support its action empirically, the Agency has failed to consider an important aspect of the problem and failed to supply record support for its conclusions. The redefinition of "source" was therefore both contrary to law and arbitrary. The repeal of the "reconstruction" rule had no independent basis and thus must fall too.

For these reasons the decision of the Court of Appeals vacating the rules changes and restoring the prior rules was correct and should be affirmed.

Respectfully submitted,

DAVID D. DONIGER
1725 I Street, Suite 600
Washington, DC 20006
(202) 223-8210
Counsel for Respondents

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